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# Mesenbrink v. Hosterman Respondent's Brief Dckt. 34714

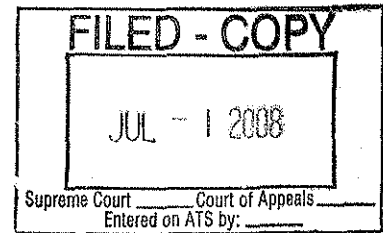
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IN THE SUPREME COURT OF THE STATE OF IDAHO

HERMAN MESENBRINK and	)	DOCKET NO. 34714
CAROL MESENBRINK, husband and wife,	)	
	)	
Plaintiffs/Respondents,	)	Boundary County Case
vs.	)	No.CV-2004-233
	)	
LARRY D. HOSTERMAN and SACHIKO	)	
HOSTERMAN, husband and wife;	)	
DEON HUBBARD and LOUISE	)	
HUBBARD, husband and wife; and	)	
JOHN DOES I – X,	)	
	)	
Defendants/Appellants.	)	
_____	)	

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RESPONDENTS' BRIEF

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APPEALED FROM THE DISTRICT COURT OF THE  
FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO  
IN AND FOR BOUNDARY COUNTY

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HONORABLE JAMES R. MICHAUD  
District Judge

---

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**I. STATEMENT OF THE CASE**

**A. PROCEDURAL STATEMENT OF THE CASE**

This matter commenced with the Respondents Herman and Carol Mesebrinks' filing of a Complaint for Quiet Title and Declaratory Relief on May 11<sup>th</sup>, 2004. R. Vol. 1, p. 9-14. The original complaint named the State of Idaho as a defendant and asserted that Herman Lake listed as a navigable body of water under the jurisdiction of the Idaho Department of Lands receded leaving exposed the lake bed and asserting the Mesebrink claim of title by reliction, accretion or avulsion. R. Vol. 1, p. 11-13.

The Appellants Hosterman and Hubbard are owners of real property located in Section 27 of Township 62 North, Range 3 East, Boise Meridian and assert a right, title and interest in or to the exposed lakebed of Herman Lake. The Appellants Hosterman and Hubbard represented by attorney Scott Reed filed an Answer on August 9, 2004. R., Vol. 1, p. 15. The Defendant State of Idaho answered by filing a Disclaimer of Interest in the property at issue on September 17, 2004. R. Vol. 1, p. 25-26.

Subsequently the Appellants Hosterman and Hubbard filed a Counterclaim and Amended Answer on December 14, 2004, seeking quiet title and injunctive relief. R., Vol. 1, p. 28-40.

As alleged in the Appellant's Brief, various Summary Judgment motions were filed by both Defendants State of Idaho and Appellants Hosterman/Hubbard. All motions for Summary Judgment were denied.

Prior to trial, the State of Idaho issued and recorded a Quitclaim Deed conveying all interest in the lakebed of Herman Lake to the Appellants Hosterman/Hubbard, the Respondents Mesenbrink and Boundary County as joint tenants. Plaintiffs' Exhibit 23.

On October 24, 2006, a Stipulation for Dismissal of the State of Idaho with Prejudice was filed and an Order executed October 25, 2006, by District Judge Steve Verby. R. Vol. 1, p. 215-219. At the commencement of trial, District Judge James Michaud presiding, it was confirmed that the Appellants Hosterman/Hubbard, through their counsel, had no objection to the dismissal of the State of Idaho as a named party in the action. Tr. Vol. 1, p. 1-2.

This matter proceeded to a five day Court Trial commencing October 30, 2006, and concluding on November 3, 2006.

The Court requested post-trial briefing and proposed Findings of Fact and Conclusions of Law, and specifically asked the litigants to address the legislative history of Idaho Code §58-104(9) and other jurisdictions definition of OHWM and their use of vegetative tests. See Motion to Augment Record, filed herewith. Tr. Vol. 2, p. 920-1.

Thereafter the District Judge issued its Findings of Fact and Conclusions of Law and Order on March 8, 2007. R. Vol. 1, p. 281-302. In its Findings of Fact, the Court concluded that the Respondents had prevailed by clear and convincing evidence in demonstrating that the Respondents' real property described as Government Lot 1, Section 28, Township 62 North, Range 3 East, Boise Meridian, was riparian property

lying adjacent to the ordinary high water mark of Herman Lake at the date of statehood. R., Vol. 2, p. 291-294.

This being the primary legal issue contested by the Appellants, the parties subsequently entered a Stipulation for Entry of Final Judgment determining the appropriate apportionment and of the relicted or receded body of water known as Herman Lake, and quieting title to the Respondent, Carol Mesenbrink. R. Vol. 1, p. 309-311.

On September 21, 2007, the District Judge entered Judgment according to the parties' stipulation. R. Vol. 1, p. 312-316.

On October 19, 2007, the Appellants filed a Notice of Appeal.

#### **B. STATEMENT OF FACTS**

Herman Lake is a small but popular lake lying in northeast Boundary County very near the Idaho-Montana state line. Plaintiffs' Exhibits 3 and 13.

The earliest records of Herman Lake are found in the Government land surveyor's notes of Albert Oliver dated September 19, 1899, through October 9, 1899. Appellants' Exhibit 1 and 2. Mr. Oliver is described as carrying a reputation amongst modern surveyors as being accurate and exacting in performing his survey duties. Tr. Vol. 2, Testimony R. Hoisington, p. 148. Mr. Oliver's notes were "quite detailed and explicit". Tr., Vol. 2, p. 233.

The Government Surveyor's notes and work are the foundation and beginning point for modern surveyors and the results dictate boundaries of private ownership from homestead patent to the present. Tr., Vol. 2, p.170-3

On September 19 and 20, 1899, Mr. Oliver surveyed the township and section lines from south to north between sections 27 and 28. Plaintiffs' Exhibit 1. At a point 39½ chains (each chain equals 66 feet), Mr. Oliver's field notes describe the terrain as leaving heavy timber and entering a marshy meadow. One-tenth of a chain later (6.6 feet), Mr. Oliver describes arriving at the "shore of lake" where he set a tamarack post for the south meander corner (also the southeast corner of the Mesenbrink property). Plaintiffs' Exhibit 1, p.3; Tr., Vol. 2, p. 179-180.

Mr. Oliver's survey crew then meandered one chain to the west to avoid the body of water later named Herman Lake to establish the north meander corner, which is adjacent to the now Mesenbrink property. Ordinarily, Mr. Oliver should have continued one-half (1/2) chain further than the south meander corner to set a quarter corner, which the lake apparently prohibited.

Mr. Oliver's notes further reflect that he set the north meander corner on the "north shore of lake" and measured the distance "across the lake" between the north and south meander corners. Plaintiffs' Exhibit 1, p.3-4.

The notes of Mr. Oliver's survey in 1899 were subsequently utilized to generate a master plat of the area. Plaintiffs' Exhibit 3. The Master Plat, dated May 15<sup>th</sup>, 1900, shows Herman Lake as an elongated body of water running from the south half of Section 27 northwesterly extending into Government Lot 1 in Section 28. Plaintiffs' Exhibit 3.



Also admitted in evidence is the chain of title and homestead records reflecting that the Mesenbrink property was perfected and approved for homestead from 1903 through 1911. Plaintiffs' Exhibit 6.

The property identified as Government Lot 1 is only 39.3 acres, reflecting .7 of an acre reduction from the standard Government Lot acreage of 40-acres, due to the displacement of Herman Lake. Plaintiffs' Exhibits 6 and 3. Tr., Vol. 2. p. 199, L. 13-23.

The Appellants Hostermans' property was homesteaded by a separated individual during approximately the same time from 1902 to 1907. Plaintiffs' Exhibit 7.

The real property which is the subject of this litigation has been in the Respondent Mesenbrinks family since 1937 when her grandparents, Robert and Genevieve Vetter, purchased and acquired title. Plaintiffs' Exhibit 4. Tr., Vol. 1, p. 18-19.

The daughters of Mr. and Mrs. Vetter, Roberta Bowen and Wilma Kirkendall, testified at trial of their earliest recollections of the property beginning in 1937. Both daughters (Roberta Bowen, age 3, and Wilma Kirkendall, age 1) well recalled their father building a dock from the Vetter property onto Herman lake at the South meander corner and fishing almost daily from March until November each year and harvesting ice during the winters. Tr. Vol. 1, p. 12, 18-19; Vol. 2. P. 33-35, 36.

At trial, Ms. Kirkendall, Ms. Bowen and other witnesses with decades of familiarity and knowledge of Herman Lake as local neighbors from the 1930s to present testified that the shape and size of Herman Lake as being significantly bigger in its earlier

years and significantly decreased in the last several decades. Tr. Vol 1, p.18-19; Vol. 2, p. 9, 14-16, 24, 49-50; 432, 435, 564.

Robert Vetter maintained a dock and boat at the south meander corner where the boat would be pulled up onto shore at a point adjacent to the cement marker denoting the south meander corner. Tr., Vol. 1, p. 13; Vol. 2, p. 36.

During World War II, the summer of 1941 or 1942, Mr. Vetter attempted to turn furrows of the peat bog in order to plant a garden below the toe of slope on the flat peat bog of Herman Lake. The furrows filled with water immediately and the land was never utilized for gardening. Ms. Bowen and Ms. Kirkendall both recall swimming in the furrow at the ages 6 and 8 and all of the adjacent surrounding land below the toe of slope and between the north and south meander corner was submerged land at that time with small hillocks of vegetation extending above the water. Tr., Vol. 1, p. 15-16; Vol. 2, p.38.

All witnesses agree that in those decades no woody vegetation such as trees or shrubs existed below the toe of slope. Tr. Vol. 1, p. 18-19, 22; Tr. Vol. 2, p. 75-76; Plaintiffs' Exhibits 10 and 12.

In approximately 1948-1949, Mr. Robert Vetter began excavating the peat from the north meander corner out to open water. The spoils from that excavation is mounded up along side the ditch and was subsequently, upon the lowering of Herman Lake, the site of various brush and timber growth. Tr., Vol. 1, p. 14, 18-19, 22; Tr. Vol. 2, p. 28-41.

In about 1965, Wilma Kirkendall saw machinery excavating the outlet at the south end of Herman Lake on what is now Appellant Hubbard's property. Tr. Vol. 2, p. 59-60. After that, the level of Herman Lake began lowering. Tr., Vol. 2, p. 57, 59-60, 76-79, 93-94.

Ms. Kirkendall testified to observing Herman Lake the night prior to her testimony and being astonished by the dramatic reduction in the size of Herman Lake. Tr. Vol. 2, p. 49-50.

In 1973, Herman and Carol Mesenbrink took title from Robert and Genevieve Vetter to Government Lot 1. Plaintiffs' Exhibit 4, p. 20. The Mesenbrinks' use of Herman Lake from their lands continued unabated until Mr. Hosterman took up full residence on his property adjacent to Herman Lake and lying to the northeast of the Mesenbrink. Tr., Vol. 2, p. 918, Line 2-7. In 2002, Mr. Hosterman and Mr. Hubbard erected a short fence where the road on the Vetter property met the shoreline at the south meander corner. Tr., Vol. 2, p. 594, 599 and 601.

To correct the Appellants' opening brief, Respondents' expert, Dr. Folsom, is a professor in the Geography department of Eastern Washington University. Dr. Folsom possesses a Bachelor of Science in geography, geology and biology, Master of Arts in Geomorphology (the science of land formations), Climatology, Ecology and Soil. Dr. Folsom also possesses a Doctorate of Philosophy in Geomorphology, Ecology, Geology and Soil Sciences. Dr. Folsom is certified in wetlands ratings and stream hydrology. Plaintiffs' Exhibit 13. Dr. Folsom was the only qualified expert witness in botany,

hydrology, geomorphology and soil sciences. Tr. Vol. 2, p. 399-400. The Defendants' experts were admittedly not qualified experts in hydrology, botany and only qualified in regard to soil sciences. Tr. Vol. 2, p. 702, 741-2,

Dr. Folsom is not merely a "wetlands specialist". Appellants' Brief, p. 4. Dr. Folsom has conducted more than 350 technical studies and field evaluations in which the central issued concerned the identification of the margin between upland zones and aquatic zones requiring the determinations of ordinary high water mark. Tr., Vol. 2, p. 539-540. Dr. Folsom has testified and written opinions to identify ordinary high water marks numerous times. Tr. Vol. 2, p. 402-404, 540.

Dr. Folsom brought a unique perspective not presented by any other witness called by the defense by integrating his expertise in botany, soil science, geography and geomorphology.

Drs. Folsom, Fosberg and McDaniel all agree that the area between the north and south meander corners extending onto the Mesenbrink property to the toe of slope is always saturated and is annually submerged with the waters of Herman Lake for several weeks each year. Tr., Vol. 2, p. 328-329; 420-1; 513-515; 700-701. The experts further agree that the hydrological system saturating and submerging the area of peat between the north and south meander corners is part of the same hydrological system or body of water as Herman Lake. Tr., Vol. 2, p. 328-9

While the Appellants' experts, Drs. McDaniel and Fosberg, only took soil samples between the north and south meander corners, they did not take soil samples or otherwise

examine the toe of slope identified by Dr. Folsom as the ordinary high water mark of Herman Lake. Tr., Vol. 2, p. 704.

All three experts, including the Appellants' scientists, Drs. McDaniel and Fosberg, agree that the vegetation test found in Idaho Code 58-104(9) is not readily applicable to the environment of Herman Lake. Tr., Vol. 2, p. 326-327; 481; 706. However, Dr. Folsom found a distinct "wave cut" feature at the northwest end of the lake and upon the Mesenbrink property, that historically fit the definition found in I.C. §58-104, before the lowering of Herman Lake. Tr., Vol. 2, p. 480-481.

Dr. Folsom provided a comprehensive analysis both in report form and in testimony in which he described the recession of Herman Lake from the northwest shoreline and the Vetter-Mesenbrink property over the past forty to fifty years.<sup>1</sup>

Dr. Folsom analyzed the topography, soil, hydrology, and vegetation at the toe of slope independently identified by the Hoisington survey crew to determine the historic and current ordinary high water mark of Herman Lake. Tr., Vol. 2, p. 406-423; 444-468. [The Respondents attach as Addendum A a copy of a portion of Plaintiffs' Exhibit 8, the "toe of slope" found by R. Hoisington and also referred to at trial as the "green line".]

A topographic break in slope is described by Dr. Folsom as a wave feature in which he testified that the hydrology dynamic of long lakes is such that wind will progress the length of a lake building up waves which create or cut the far slope of the

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<sup>1</sup> This coincides in chronology with the testimony of Wilma Kirkendall who observed excavation of the south outlet ditch in approximately 1965.

shoreline. This feature was evident upon the Mesenbrink property at the northwest end of Herman Lake.

As further evidence of Dr. Folsom's finding of the wave feature, Dr. Folsom found certain trees seeking sunlight configured in a "hockey stick" configuration as depicted in his report. Plaintiffs' Exhibit 14, p. 2. This hockey stick configuration is caused by the erosion upon the shoreline to that point which small or juvenile trees begin collapsing toward the lake. Subsequent growth of the trees is redirected skyward leaving a bend in the trunk of such trees at the base and near the eroded shoreline. Tr., Vol. 2, p. 453-455. Several were found on the Mesenbrink property near the north meander corner.

Dr. Folsom also found vegetation evidence indicating that the toe of slope delineated by the survey crew from Sewell & Associates, Mr. Randy Hoisington, coincides with a change in vegetation. Upland of the toe of slope, Dr. Folsom found woody, upland species of trees. Downward of the toe of slope, only aquatic or wetland species were found, of a type requiring submersion and saturation for survival. The exception to Dr. Folsom's delineation of upland versus aquatic species is a colony of juvenile woody plants, specifically lodge pole pine trees, brush, and broad leaf trees all of which Dr. Folsom analyzed with core samplings methods and determined to be less than 43 years of age. Plaintiffs' Exhibit 14, p. 5-6.

Dr. Folsom further testified that an anomaly existed along the northwest shoreline of Herman Lake. A colony of black cottonwood trees had previously existed along the shore of Herman Lake but died in recent decades with increasing frequency upslope from

the toe of slope representing the previous shore of Herman Lake. Dr. Folsom testified that the birch and black cottonwood are a riparian species of vegetation and almost always occur adjacent to bodies of water or have ready access to consistent and significant water sources. Tr., Vol. 2, p. 445-446.

Appellants attached Addendum #3 to their brief, a publication of Flora of the Northwest. This was neither an exhibit nor the subject of testimony at trial. As it is not a part of the appellate record, the Respondents object and move to strike Addendum #3 and all references in Appellants' Brief.

Dr. Folsom's finding of the dead or dying upslope black cottonwood and to the southwest birch species indicated strongly a deprivation event dating back to and which coincides with the colonization of woody brush and trees, below the toe of slope approximately 40-50 years ago. Dr. Folsom was able to confirm this timeline chronology by dating the still surviving black cottonwoods along the prior northwest shoreline of Herman Lake and determining that, with few exceptions, all of those surviving trees were in excess of 40 years of age. Tr., Vol. 2, p. 446-447. Dr. Folsom noted that thriving cottonwood communities typically containing mixed age stands with many individuals in the juvenile stage". For this stand at Herman Lake, there are only three trees younger than about 41-years: apparently, since that time, something has nearly prevented successful reproduction of the cottonwoods. Decreasing soil moisture would have this effect on such drought intolerant trees as cottonwoods. Plaintiffs' Exhibit 14, p. 5.

Dr. Folsom conducted a similar aging and analysis of the birch stand along the historical east shore of Herman Lake coinciding with the toe of slope and determined similarly that all such trees were above 40-years of age. Dr. Folsom found that a radical change took place in the ability of this stand to sustain itself and that that change occurred approximately 40 and 50 years ago. Plaintiffs' Exhibit 14, p. 6.

Dr. Folsom also testified that the soil evidence coincided with a historic shoreline at the toe of slope.<sup>2</sup> Mr. Meckel, called as witness for the Appellants, testified that he did not understand where the toe of slope lay and believed it to be the top of that elevation change rather than the bottom. Tr., Vol. 2, p. 857-858.

Based upon the unequivocal testimony of Dr. Folsom in which the professor integretated topographical, geographical, soil science and vegetation evidence, the District Judge concluded in Finding of Fact No. 31 as follows:

Location of the ordinary high water mark of Herman Lake in 1890 is clearly marked by a visible line of vegetative growth and by topographic feature and change in soil type. The topographic elevation of the toe of slope and vegetation line of birch and cottonwood trees corresponds with the meander corner set on the section line by Albert Oliver in 1899 relocated by Randy Hoisington. (Exhibits 1, 3 and 8). The coincidence or conjunction of the change of soil type and the vegetation tree line located along the toe of slope elevation between the north and the south meander corners is very persuasive evidence clearly delineating a line ordinary high water. The toe of slope topographic feature in coincident tree line of birches and cottonwoods

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<sup>2</sup> The toe of slope is defined by Mr. Hoisington and Dr. Folsom as that point at the base of the wave feature or abrupt elevation change shown on page 2 of Dr. Folsom's report and Addendum A hereto. Plaintiffs' Exhibit 14.



as shown on Exhibit 8 is the location of the ordinary high water mark of Herman Lake on July 3, 1890.

R. Vol. 2, p. 291.

## **II. ISSUES PRESENTED ON APPEAL**

- A. Standard of Review
- B. The District Court Correctly Applied Idaho Law from a Well-Established Line of Cases to Determine that Carol Mesenbrink Proved the Ordinary High Water Mark ("OHWM") Follows the Toe of Slope
- C. The District Court Correctly Utilized the Testimony of the Defendants' Witness, James Meckel, as Explaining the Draw Down of Herman Lake
- D. The Testimony Presented by Respondents Provides Several Likely Causes of the Lowering of Herman Lake
- E. The Trial Court Correctly Disregarded the Appellants' Arguments Based upon Mr. Meckel's Elevation Measurement on the Toe of Slope
- F. Attorneys' Fees

### III. ARGUMENT

Appellants state four (4) separate “ISSUES ON APPEAL”, but do not directly argue or reiterate any of these issues in the “Argument” section of their Brief.

Appellants’ Brief, p.23, 25. As such, Respondents have restated the Issues on Appeal as set forth below and as actually argued by Appellants.

#### A. STANDARD OF REVIEW

Where the trial is submitted to the District Judge without jury and the evidence and legal issues require both findings of fact and conclusions of law, the standard is as follows:

A trial court’s findings of fact in a bench trial will be liberally construed on appeal in favor of the judgment entered, in view of the trial court’s role as trier of fact. Anderson v. Larson, 136 402, 405, 34 P.3d 1085, 1088 (2001) Findings of fact based on substantial and competent evidence will not be overturned on appeal even in the face of conflicting evidence. Benninger v. Derifield, 142 Idaho 486, 489129 P.3d 1235, 1238 (2006). It is the province of the District Court to weigh conflicting evidence and testimony and to judge the credibility of the witnesses. We exercise free review over the lower court’s conclusion of law to determine whether the trial court correctly stated the applicable law and whether the legal conclusions are sustained by the facts.

Beckstead v. Price, 2008 W.L. 2415830,  
\_\_\_\_ P.3d \_\_\_\_ (June 17, 2008)

The trial court, as a matter of law, concluded that the Plaintiffs were required to show proof of ordinary high water mark of Herman Lake by “clear, satisfactory and

convincing” standard of proof. R., p.293, #2, citing Erickson v. State, 132 Idaho 208, 920 P.2d 1 (1998).

The court further found that Plaintiffs met their burden of proof by introducing evidence so “clear, direct weighty, in terms of quality, and of such convincing force as to cause the court to come to a clear conviction of the truth of the precise facts in issue.” R., p. 293-4. The court found all of the evidence and testimony, including that presented by some of the Defendants’ experts, demonstrated the ordinary high water mark of Herman Lake along the line at the “toe of slope intersecting with the north and south meander corners as set by Albert Oliver in 1899 and as illustrated by Exhibit 8”. Id. The court further found that level or elevation of the historic lake level of Herman Lake was not due to “sudden or temporary freshets but rather is the historical, annual and ordinary high water mark of Herman Lake.” R., Vol. 2, p. 292.

This Court should not consider evidence not part of the trial record. The Appellants have the burden of providing a sufficient record on appeal. Garcia v. Pinkham, 144 Idaho 898, 174 P.3d 868 (2007). The Respondents object to all of Addendum No. 3 attached to Appellants’ Brief. Addendum No. 3 is not part of the trial record and should not be considered on appeal.

Despite the Appellants’ request, this Court should affirm the trial court’s findings of fact as well supported by the evidence and the trial court’s conclusions of law as proper statements of the law of Idaho.

**B. THE DISTRICT COURT CORRECTLY APPLIED IDAHO LAW FROM A WELL ESTABLISHED LINE OF CASES TO DETERMINE THAT CAROL MESENBRINK PROVED THE ORDINARY HIGH WATER MARK (“OHWM”) FOLLOWS THE TOE OF SLOPE.**

The Appellants assert in Issue I of the Issues on Appeal that the district court erred by adopting the testimony of Dr. Folsom concerning the vegetation observed upland of the toe of slope as an indicator of a prior ordinary high water mark of Herman Lake. Although Appellants do not directly set forth Issues I, II, III and IV in the Argument section of the Appellants’ Brief, it is presumed that Appellants’ earlier Statement of Facts (which contain more argument than fact) is intended to be an articulation of Issue I.

Consequently, the Respondents’ Brief will address Issue I and the use of Idaho Code § 58-104(9) as the standard for determining ordinary high water mark.

The Appellants assess error to the District Court’s ruling for not adhering solely to Idaho Code Section 58-104(9) and other case law as a standard for defining ordinary high water mark (hereinafter “OHWM”). This issue was resolved by this Court some 85 years ago.

In perhaps the earliest reported Idaho case addressing OHWM, the Idaho Supreme Court defined OHWM as that point or points “along the shore where water rises to such a height as may reasonably be anticipated, but does not include such extraordinary freshets as cannot be anticipated”. Raide v. Dollar, 34 Idaho 682, 690, 302 P. 469, \_\_\_\_ (1921).

The Appellants argue that Idaho Code §58-104(9) provides the sole test for determining OHWM. A close inspection of Idaho law does not support the Appellants argument.

A review of Idaho Code Section 58-104(9) and its legislative history reveals that it was not adopted until 1967. The legislative history and specifically the records of the committee on high water mark attempted to discern certain legal issues regarding Idaho riparian rights. Furthermore, it would appear that passage of Idaho Code 58-104(9) adopting a vegetation line test was intended to provide the State Land Board with certain powers and direction in exercising its jurisdiction as the State agency authorized to regulate, manage and control the beds of navigable lakes.

Nonetheless, the vegetative test founded in Idaho Code 58-104(9) has repeatedly been viewed by the Idaho Courts as just one test for determining OHWM. See Raide v. Dollar, *supra*; In Re: Sanders Beach 143 Idaho 43, 137 P.3d 75 (2006).

The vegetative line test is further described in an early U.S. Supreme Court case of Howard v. Ingersoll as follows:

“That line which is to be found by examining the beds and banks and ascertaining where the presence and action of water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from the banks in respect to vegetation, as well as with respect to the nature of the soil itself. . . . but in all cases the bed of a river is a natural object and is to be sought for not nearly by the application of abstract rules, but as other natural objects are sought for and found by the distinctive appearances they present; the banks being fast land, on which vegetation *appropriate to such land in the particular locality*, grows wherever the bank is not too steep to permit such growth and the bed being soil of a different character and having no vegetation, or

*only such as exists when commonly submerged in water.*

Howard v. Ingersoll,  
14 L.Ed. 189, 54 US 381, \_\_\_\_\_ (1851)  
[italics added]

This early expression of the OHWM analysis is helpful in keeping a perspective that Appellants seem unable to maintain. It is not the absence of vegetation, rather the presence of vegetation “appropriate” to the locale or of a type consistent with or commonly submerged. Drs. Folsom, McDaniel, and Fosberg all agree that the *Campylium* moss found in the peat soils between the meander corners is submerged several weeks to even months each year. Tr., Vol. 2, p. 328-329; 420-1; 513-515; 700-701.

The Appellants insist that the District Court erred in not applying solely Idaho Code 58-104(9) as a vegetation test to determine where the OHWM of Herman Lake exists. The Appellants’ position that Idaho Code 58-104(9) is the sole means of determining OHWM is not supported by Idaho’s recent appellate case law on the subject.

In reaching its decision that the OHWM was 2130 feet, the district court relied primarily upon the lack of vegetation at Sanders Beach and secondarily upon records showing the high water levels for the years 1893 through 2004. In doing so the district court erred .... Likewise, the OHWM is not determined by whether there is vegetation in a particular place on the lakeshore. While the presence of vegetation, “the vegetation test”, is important in determining the OHWM, it is merely “an aid” in that determination; not the sole and exclusive means of proving the location of that line. The lack of vegetation in a particular place can be from reasons other than being covered by water for a long

enough period of time to deprive the soil of vegetation. A sandy beach devoid of vegetation can be above the OHWM. The OHWM is based upon the water ordinarily covering the soil for a sufficient period of time to destroy the value of the land for agricultural purposes by preventing the growth of vegetation. It is not based upon the action of waves or current undermining or eroding banks and shorelines above the level of the water when in repose.

In Re: Sanders Beach, 143 Idaho 443, 447-8, 147 P.3d 75, 79 (2006) (citation omitted)

The Supreme Court articulated an approach which directs district courts to use the vegetation test when it is applicable but not exclusively and it is not even correctly viewed as the primary or best test of OHWM.

The opinion in In Re: Sanders Beach went on to specifically adopt former District Judge Gary Haman's analysis of OHWM and the vegetation test as follows:

It is the conclusion of the Court that the vegetative definition of OHWM as judicially defined in Idaho cases beginning with Raide v. Dollar, supra, should be utilized only under circumstances where the conditions lend themselves to its applicability. In cases where no evidence could be found which could support a finding of an actual line impressed on the soil on July 3, 1890, it is my conclusion that the true required Finding of Fact continues to be simply the OHWM which may be established by evidence that is unrelated to either soil or vegetation.

In Re: Sanders Beach, supra, at 448 quoting Idaho Forest Industries Inc. v. Hayden Lake Water Shed Improvement District, 135 Idaho 316, 321, 17 P.3d 260, 265 (2000).

Despite the Appellants' argument, which runs directly contrary to the Idaho Supreme Court's rulings in Raide, Idaho Forest Industries, and Sanders Beach,



District Judge Michaud correctly noted that the vegetation test was not the sole test of OHWM for Herman Lake.

Indeed, all three experts including Drs. Fosberg and McDaniel presented by the Appellant, agreed that the vegetation test is difficult to apply to the circumstances of Herman Lake. Tr., Vol. 2, p. 326-327; 481; 706.

Appellants argue that Dr. Folsom did not apply Idaho law in determining the OHWM of Herman Lake.

To the contrary, Dr. Folsom was the only witness to apply the Idaho case law recited above in determining the OHWM of Herman Lake. Dr. Folsom analyzed four distinct tracks of evidence: topography, hydrology, soils, and vegetation to determine that two distinct zones coincide perfectly at the toe of slope. The toe of slope line was independently delineated by the Hoisington survey crew based upon surveyors' observations of topography and vegetation line. Plaintiffs' Exhibit 8a. The toe of slope coincides with the north and south meander corners originally fixed by Surveyor Oliver at "the shore of lake" in September, 1899.

In 2004, Randy Hoisington, PLS, surveyed the subject property and identified a toe of slope which appeared to represent the historic approximate high water line "per physical location of field tie to toe of slope and vegetation line." Plaintiff's Exhibit 8a.

Subsequently in 2005 and 2006, Dr. Folsom conducted independent analysis to determine that the topography, vegetation, and soil all constitute a "set of evidences that in previous times during the historical era that the lake level was higher and regularly and

commonly reached that boundary” that being the toe of slope. Tr., Vol. 2, p. 408, L. 21; p. 409, L. 2. Dr. Folsom looked at several elements or “sets of evidences” which all were “congruent” indicators of an historic shoreline upon the toe of slope identified by survey.

### **1. Topography**

Dr. Folsom described shoreline topography as usually having abrupt breaks in slope. These demarcate the “high energy water” of the lake from the upslope processes. Tr., Vol. 2., p. 409, L.7-22 This was found on the northwest shore of Herman Lake on the Mesenbrink property perfectly coinciding with the toe of slope identified by survey.

Additionally, Dr. Folsom noted an abrupt overhang and evidence of prior shoreline erosion in the same location. Tr., Vol. 2, p. 409-410. He also referred to this topographic feature that coincides with the toe of slope line on the Hoisington survey, as a “wave cut shoreline” that before Herman Lake was lowered was an area of the lake which classically fit the “deprived of vegetation” test from Idaho Code §58-104(9). Tr. Vol. 2, p. 480, L.14, p. 481, L.14. This wave cut feature was exactly located where it should be at the end of the long axis of the lake. Tr., Vol. 2, p. 410, L. 17, p. 411, L. 10. Dr. Folsom described this feature as a one of the topographic features that “strongly” indicates a prior active shoreline where “high energy water” worked to erode the shoreline on the Mesenbrink property near the north meander corner. Id.

### **2. Hydrology**

Dr. Folsom testified that the second line of evidence supporting his determination of ordinary high water mark is the hydrology. Upslope from the toe of slope line seen on

Addendum A, Dr. Folsom found soils with no evidence of saturation indicative of Herman Lake's presence. Tr., Vol. 2, p. 413-415.

Below the toe of slope line Dr. Folsom took several samples and classified the soil as organic plant material with some partially decayed organic matter and some well preserved organic matter. These findings suggested a scientific conclusion that the organic matter was preserved in water deep enough that oxygen was unavailable. Tr., Vol. 2, p. 416-417. Dr. Folsom further found that the depth of water test holes taken along the section line and below the toe of slope would evidence submersion of at least two (2) to three (3) feet of water. Tr., Vol. 2, p. 418.

Also in this regard, Dr. Folsom discussed the photosynthesis process as it works in the *Campylium* moss discussed at great length by the Appellants' experts, Drs. McDaniel and Fosberg. As a botanist, Dr. Folsom concluded that the *Campylium* moss is capable and thrives in shallow water and actually acts like a mattress saturated with the water of Herman Lake when the lake is at its lowest. Photosynthesis will occur at least several weeks to months each year through standing water. Tr., Vol. 2, p. 420-421.

### **3. Soil**

Dr. Folsom found well drained mineral soils upslope of the toe of slope line consistent with upland soil types for the area. At the toe of slope, the samples gathered by Dr. Folsom indicate a transition evidencing that something had disturbed the process of soil creation as seen upslope. Tr. Vol. 2, p. 413. Downslope or lakeward from the toe of slope line, Dr. Folsom's found completely different soils consisting of decaying

organic matter with some partially decaying plant matter and some well preserved plant matter consistent with lake bed soil types. Tr. Vol. 2, p. 413-4, 416. The samples taken between the north and south meander corners were extracted by Dr. Folsom walking on the relatively dry ground. However, the preserved or partial decayed plant matter is indicative of oxygen deprivation equating to “deep” water submersion. Tr. Vol. 2, p. 416-417.

#### **4. Vegetation**

Dr. Folsom describe four (4) congruent sets of evidence all pointing to a historic shoreline that intersected the north and south meander corners and placing Herman Lake upon the Mesenbrink property. However, Dr. Folsom described the vegetative evidence as the “strongest” proof. Tr., Vol. 2, p. 421, L. 22-3.

##### **a. Vegetative evidence of lake reliction**

##### **i. General vegetation type**

Below or lakeward of the toe of slope as identified by survey as the historic shoreline, Dr. Folsom identified wetland or hydric plants which requires water submersion and saturation for portions of each year and only thrive in such an environment. Tr., Vol. 2, p. 418-421.

The only woody vegetation found below the toe of slope line was lodge pole pines less than 43 years of age and brushy riparian zone vegetation of a much younger age. Dr. Folsom noted that such woody vegetation would not find suitable habitat in the peat bog

area unless the site were drained or sufficiently exposed to make high spots available to such woody vegetation.<sup>3</sup>

Upslope from the toe of slope, Dr. Folsom noted typical riparian zone vegetation of the type and species expected along a lake shoreline. Specifically, Dr. Folsom noted birch and cottonwood.

**ii. Vegetation reacts to lake lowering.**

Dr. Folsom described birch and cottonwood colonies along the north and west shorelines of the lake showed evidence of a dramatic event of water desiccation or deprivation which began 40-50 years ago and continues to the present. Dr. Folsom testified that both species of trees require significant water levels and are drought-intolerant. Ordinarily, black cottonwoods colonize along water bodies or shorelines. The black cottonwoods are on the northwest edge of the toe of slope near the north meander corner and the Vetter home site.

In the case of both the black cottonwood and birch colonies, Dr. Folsom noted the lack of juvenile trees less than 40 years of age. Under normal conditions both black cottonwood and birch species would re-colonize, revealing a healthy stand of both juvenile and mature trees. Furthermore, over 90% of the trees upslope of the shoreline colony are dead with no repopulation evident. Dr. Folsom notes the anomaly of dead upslope trees and non-reproducing "shoreline" trees and concludes that it is apparent that something has

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<sup>3</sup> Of note is the colony of lodge pole pines which perfectly coincides with the spoils pile left by Robert Vetter's excavation of the canal in the late 1940's.

diminished the life support conditions of this riparian, upslope fringe. Dr. Folsom identified two other possible causes as fire or disease and eliminated both for lack of evidence consistent with either such cause. Tr., Vol. 2, p. 447-449.

Dr. Folsom concluded that the following factors: 1) the existence and aging of lodge pole pines under 43 years upon the peat bog; 2) the nonexistence of juvenile, cottonwood or birch, under 40 years of age at the toe of slope; and, 3) the dead upslope birch and cottonwood, cumulatively point to a significant lowering of Herman Lake approximately 40 to 50 years ago. Plaintiffs' Exhibit 14.

This coincides closely in time with the outlet excavation observed by Ms. Kirkendall and the consistent testimony of all witnesses that the lake level has been reduced in the past 40 years.

**b. Vegetative evidence of shoreline at the toe of slope**

Dr. Folsom noted a riparian fringe 80 to 100 feet wide at the lake margin and upslope from the toe of slope delineated on Plaintiffs Exhibit 8-A as the green line. Tr., Vol. 2, p.444, L. 11-24. The riparian fringe consists of broadleaf vegetation which is moisture demanding and "drought intolerant". Tr., Vol. 2, p. 444-446. The vegetation upslope of the riparian fringe is conventional conifer forest, typical of upland environs and tolerant of dry summers, typical of the area. Tr., Vol. 2, p. 421-2, 444.

Dr. Folsom describes this riparian zone as consisting of broadleaf trees, such as birch and cottonwood, and which perfectly coincides with the toe of slope identified by survey. Plaintiffs' Exhibit 8-A and 14. Upland from that zone of broadleaf trees is a stand

of conifer trees all of which is perfectly consistent with a riparian zone. Dr. Folsom notes that several of the broadleaf, riparian zone trees existing along the topographic break in slope (discussed below) show signs of early life water action eroding the slope causing the young trees or saplings to shift sideways and then redirect growth vertically. The result is trees with a “hockey stick” trunk or base formation. The evidence suggests wave action at that break in slope.

## **5. Summary**

From all lines of evidence observed, Dr. Folsom stated that the ordinary high water mark coincides with the toe of slope. Dr. Folsom said the lines of evidence all perfectly coincide to show the toe of slope as the point at which the waters of Herman Lake can reasonably be anticipated to rise. Tr., Vol. 2, p. 486-487.

Dr. Folsom clearly distinguished the ordinary high water mark point from mere presence of wetlands plant life. Tr., Vol. 2, p. 489-492.

Dr. Folsom clearly understood Idaho’s definition of ordinary high water mark. Tr., Vol. 2, p. 493.

**C. THE DISTRICT COURT CORRECTLY UTILIZED THE TESTIMONY OF THE DEFENDANTS' WITNESS, JAMES MECKEL, AS EXPLAINING THE DRAW DOWN OF HERMAN LAKE.**

The Appellants assign error to the trial court's findings stating that it was "major error for the trial court not to determine from Mr. Meckel's testimony that the outlet ditch (through Hubbards' property) and culvert under the County Road had no effect upon or lowering of Herman Lake. Appellants' Brief, p.32.

The Appellants refer to District Judge Michaud's findings as confusing and vigorously assert that no human action has ever caused a lowering of the lake.

However, Appellants overlook the clear testimony from Mr. Meckel. Mr. Meckel's measurements determine that, as of his visit in August, 2006, (the low water season), the bottom of the County Road culvert was two (2) feet below lake level. Tr., Vol. 2, p. 822, 828 and 832. Mr. Meckel did find a high point in the ditch between the lake and the culvert which was nearly one (1) foot lower than the summer lake pool level. Tr., Vol. 2, p. 834. However, the un rebutted testimony from the Respondents' witnesses established that the drainage ditch has been manmade or maintained over the years and, thus, its elevation or depth has changed according to the current ownership.

Regardless, District Judge Michaud clearly understood Mr. Meckel's testimony and placed it in its proper context in the court's findings and conclusions:

The historical hydrology of the shoreline of Herman Lake has changed in recent times. The ditching of an outlet at the south end of Herman Lake is a cause of this change in hydrology. The data of surveyor James Meckel helps



explain the dynamic. When the lake is at or below the bottom of the ditch no water flows from Herman Lake through the ditch. (Exhibit II) The ditch does not allow the water level of Herman Lake to get high enough to reach the toe of slope location coincident with the tree line investigated by Dr Folsom along the toe of slope.

R., Vol. 2, p. 287, ¶20

The court did not err in its findings with regard to Mr. Meckel's testimony and placed Mr. Meckel's testimony in the correct context for explaining hydrology and lowering of the level of Herman Lake. This Court should, therefore, affirm the District Court's findings.

**D. THE TESTIMONY PRESENTED BY RESPONDENTS PROVIDES SEVERAL LIKELY CAUSES OF THE LOWERING OF HERMAN LAKE.**

The Appellants argue to this Court that District Judge Michaud's Opinion "totally collapses" for failing to establish the causes of the lowering of Herman Lake. Appellants' Brief, p.34.

The Appellants also urge that their evidence consisting of Forest Service aerial photographs from 1934, 1968, and 1978 through 2002 clearly establishes the same lake level throughout. However, even the Appellants' experts agree that all of the Forest Service aerial photos submitted were photographed at the driest season in July and August and, therefore, at best reflect the ordinary low water mark of Herman Lake. Tr., Vol. 2, p. 859.

Also, none of the witnesses could discern shoreline from shallow vegetated waters along the perimeter of Herman Lake in the historical aerial photos.

Despite this, the Respondent Mesenbrink presented several causes for the lowering of Herman Lake in addition to the Appellants' witness, Jim Meckel's, testimony.

Dr. Folsom and other witnesses testified that the historical aerial photos clearly evidenced excavation of the outlet ditch. Tr., Vol. 2, p. 152-153; p. 470-471.

Secondly, Dr. Folsom analyzed the regional precipitation data gathered from the Bonners Ferry Meteorological Station maintained by the U.S. Department of Agriculture. In doing so, Dr. Folsom noted that the average annual precipitation (snow and rain) in

the period from the 1930's through 1970, as compared to the annual average from 1971 through 2000, reflected a decrease in average precipitation of one (1) inch per year. Tr., Vol. 2, p. 471-475; Plaintiffs' Exhibit 29. From this data, Dr. Folsom concluded that Herman Lake's hydrology is "variable and dynamic" and its behavior is closely tied to the local water shed and available precipitation. Tr., Vol. 2, p. 476.

These findings concerning the average rainfall also tie well to the timeline presented by Mesenbrinks and their case in chief including a major excavation event in the mid-1960's witnessed by Wilma Kirkendall followed by all witnesses' testimony that the level of Herman Lake was greatly reduced after 1970.

Contrary to the Appellants' arguments, the Respondents Mesenbrink presented a complete and, in the trial court's eyes, convincing case demonstrating the lowering of Herman Lake over time and the likely causes thereof. This Court should affirm the trial court's Findings and Conclusions.

**E. THE TRIAL COURT CORRECTLY DISREGARDED THE APPELLANTS' ARGUMENTS BASED UPON MR. MECKEL'S ELEVATION MEASUREMENT ON THE TOE OF SLOPE.**

The Appellants appear to argue in their opening brief that Mr. Meckel's testimony definitively established a two (2) to three (3) foot elevation difference between the toe of slope ordinary high water mark found by Respondents' experts and the current level of Herman Lake. This argument is not supported by the record.

The Trial Court did not misconstrue Mr. Meckel's testimony. Simply put, Mr. Meckel's testimony was irrelevant in rebutting Mesenbrink's case, because Mr. Meckel misunderstood the location of the toe of slope as the top of the wave cut feature at the northwest end of Herman Lake. As a result, all of Appellants' arguments as to the volume of Herman Lake and a three (3) foot higher lake pool level are inaccurate and irrelevant.

It is clear from the trial transcript that Mr. Meckel did not understand the toe of slope line or its location on the ground at the site. The following dialog on cross-examination occurred:

Q. So, again, my point being that at the point you measure at 2484 is at a point higher than that flat area?

A. Then (sic) the peat bog, yes.

Q. And I'm not sure I follow –

THE COURT: Now, wait a second. 2484 is what? Left what point?

MR. FEATHERSTON: That's designated by Mr. Meckel as the north meander corner elevation.

THE COURT: Ground level – what were you comparing it to? The slope break elevation?

MR. FEATHERSTON: Yes, he identifies the break in slope as being approximately .2 feet higher than that. All of which is significantly higher than the peat bog – the flat area that we talked about.

THE COURT: Two or three inches higher.

BY MR. FEATHERSTON:

Q. Do you know the difference between the elevation of that peat bog area?

A. Well, I did not exactly measure that.

Q. Did you measure the elevation of any trees that stood out on that?

A. I measured the elevation of the ground adjacent to several trees.

Q. Which trees on your Exhibit "II" depicted the elevation on that – of that ground surrounding them on the peat bog material?

A. Neither one of them necessarily. They may be coincident with it, but I can't say because I did not measure the elevation of the surface of the peat bog.

...

Q. Let me back up. I'm not sure that you and I have the same understanding of what has been described as a toe of slope?

A. I think you are correct.

Tr., Vol. 2, p.856-858

What is apparent from this colloquy is that Mr. Meckel was measuring elevation above the abrupt wave cut feature testified to by Dr. Folsom. This, despite all of the testimony from Dr. Folsom, Mr. Brady and Mr. Hoisington that there was a distinct break in slope from the flat historical lakebed, now described as the peat bog, which rises approximately two (2) feet. Mr. Meckel was measuring the point at the top of that break in slope.

All of the Respondents' witnesses identified the toe of slope as the ordinary high water mark. All of the witnesses testified that the toe of slope is that point at the base of the wave cut feature where the lake bed meets the rise in topography. Tr., Vol. 2, p. 174-175.

As such, the trial court correctly found that Mr. Meckel was not measuring the toe of slope. That colloquy is found as follows:

THE COURT: There isn't any evidence that the place where he measured what he calls the slope is the place where Dr. Folsom did.

Tr., Vol. 2, p. 858

As such, Mr. Meckel's testimony, though useful in establishing the cause of the drawdown of Herman Lake, is not useful in rebutting or responding in any way to Respondents' case for establishing the ordinary high water mark at the toe of slope. The court correctly disregarded Mr. Meckel's testimony for the purposes now argued by Appellants in this appeal.<sup>4</sup>

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<sup>4</sup> Mr. Meckel clearly stated he was not qualified, nor asked to look for the ordinary high

This Court should affirm the trial court's Findings and Conclusions.

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water mark. In fact, Mr. Meckel stated he was simply looking for the "long term summer level." Tr., Vol. 2, p. 860.

#### **F. ATTORNEYS' FEES**

For the reasons set forth above, the trial court's findings should be affirmed and the Appellants' assignment of errors rejected. The Appellants have proffered nothing new to the Court in terms of oral argument, legal issues or errors in the court's findings.

The Respondent Mesenbrink requests an award of attorneys' fees under Idaho Appellate Rule 41.

Under and pursuant to Idaho Code § 12-121, Respondent is entitled to reasonable attorneys' fees as a prevailing party if this Court determines that the action was brought or pursued "frivolously, unreasonably or without foundation". I.C. § 12-121 (2007).

An award of attorneys' fees under this statute is appropriate if the Appellant simply invites the Appellate Court to second guess the trial court on conflicting evidence.

Benninger v. Derifield, 145 Idaho 373,  
179 P.3d 336, 341 (2008)

The Appellants have simply asked this Court to second guess the findings of fact entered by the trial court. Appellants have argued that the trial court should have adopted the testimony of Drs. Fosberg and McDaniels, though their testimony was limited to soil analysis and they made no inspection of the toe of slope, which was at issue in this litigation.

The Appellants have further argued that this Court should adopt Mr. Meckel's testimony over Dr. Folsom's testimony, though Mr. Meckel admitted he was not qualified



nor asked to establish the ordinary high water mark and also admitted that he did not know where the “toe of slope” was, which was at issue in the litigation.

Further, the Appellants have asked this Court to find error in the District Judge’s application of law. The District Court correctly applied Idaho law and, most specifically, this Court’s recent ruling in In Re: Sanders Beach, 143 Idaho 443, 147 P.3d 75 (2006), which clearly establishes the test for ordinary high water mark. The District Judge acknowledged the Appellate Court’s prior holdings and adopted and integrated them into his Findings of Fact and Conclusions of Law.

The Appellants have simply asked this Court for an opportunity to re-litigate the issues previously litigated before the District Court. An award of attorneys’ fees and costs is appropriate and is requested by Respondent Mesenbrink.

#### IV. CONCLUSION

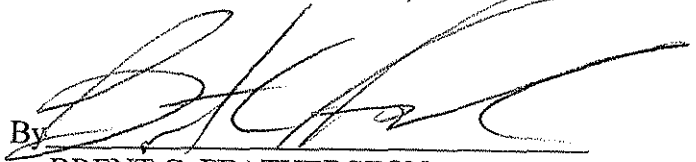
The Respondent, Carol Mesenbrink, presented to the District Court a complete case including historical eye witness testimony dating from 1937 to the present showing the historical and currently lower lake levels of Herman Lake.

The Respondent's case presented the only expert qualified to analyze the four (4) lines of evidence: topography, hydrology, soil and vegetation, and to draw from the interdisciplinary analysis a conclusion that the ordinary high water mark of Herman Lake is the toe of slope as independently tied by survey.

Based upon the case law and evidence presented, this Court should affirm the trial court's ruling and should award attorneys' fees and costs to Respondent Mesenbrink.

RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of June, 2008.

FEATHERSTON LAW FIRM, CHTD.

By 

BRENT C. FEATHERSTON  
Attorney for Respondents Mesenbrink

### CERTIFICATE OF MAILING

I hereby certify that on the 27<sup>th</sup> day of June, 2008, I caused a true and correct copy of the foregoing document to be served upon the following person(s) in the following manner:

Scott W. Reed, Esq.  
P.O. Box A  
Coeur d'Alene, Idaho 83816

☒ U.S. Mail, Postage Prepaid  
☐ Overnight Mail  
☐ Hand delivered  
☐ Facsimile No. (208) 765-5117  
☐ Other: \_\_\_\_\_

By 

# SECTION 28, 1

## BOUNDARY (

SECTION CORNER  
FND. 4"x4" CONCRETE  
MONUMENT, SEE C,P & F  
INST. No. 190223 FILED  
BY RLS No. 7877.

BASIS OF BEARING

(2682.19', N0°13'38"E)  
2682.08', N0°13'38"E  
1746.13'

FND. 5/8" REBAR  
WITH PLASTIC CAP,  
RLS No. 3628, LIES  
0.49' WEST OF LINE

FND. 5/8" REBAR  
WITH PLASTIC CAP,  
RLS No. 3628, LIES  
0.51' WEST OF LINE

SET MEANDER CORNER  
AT PROPORTIONED POSITION

APPROXIMATE HIGH WATER LINE  
PER PHYSICAL LOCATION OF  
FIELD TIE TO TOE OF SLOPE  
AND VEGETATION LINE.

FND. 5/8" REBAR WITH  
CAP, RLS No. 3628,  
LABELED W1/4 CORNER  
N C, P & F INST. No.  
90217

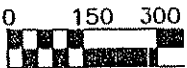
FND. 5/8" REBAR WITH  
ALUMINUM CAP, RLS No.  
820 PER RECORD OF SURVEY  
INST. No. 139498, ACCEPTED  
AS MEANDER CORNER

SECTION CORNER  
FND. 4"x4" CONCRETE  
MONUMENT PER RECORD  
OF SURVEY INST. No.  
39498

WATER LINE ELEVATION LINE =  
2515.89' AS MEASURED ON  
SEPTEMBER 30th, 2004.



SCALE-1"=



SCALE IN